Editor's note: Appealed – reversed, Civ. No. 2039 (D. Nev. Nov. 7, 1974), aff'd, No. 75-1532 (9th Cir. May 12, 1977) 553 F.2d 1209, aff'd in part, rev'd as to locatability of water, S.Ct. No. 77-380 (May 31, 1978), 436 U.S. 604, 98 S.Ct. 2002

UNITED STATES
v.
CHARLESTON STONE PRODUCTS, INC.

IBLA 71-111 Decided January 18, 1973

Appeals from decision of Administrative Law Judge Graydon E. Holt in mining contests Nevada 065729 A to Q, inclusive, and Nevada 065731 A & B.

Decision affirmed in part, reversed in part.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

To satisfy the requirements for discovery on a placer mining claim located for a common variety of sand and gravel prior to July 23, 1955, it must be shown that the exposed material could have been extracted, removed and marketed at a profit on that date, and further that the market for the material from the claim has continued without substantial interruption to the present time; where such a showing is made, a contest against that claim is properly dismissed.

A placer mining claim located for a common variety sand and gravel prior to July 23, 1955, from which claim mineral material was extracted, removed and marketed at a profit on that date, and which mineral material could have participated in the same market without interruption to the present time, is properly declared to be a valid mining claim.

Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of

that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, is insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date, and where claimants fail to make such a showing the claim is properly declared null and void.

Mining Claims: Contests--Mining Claims: Determination of Validity

To establish a prima facie case and to meet its burden of proof in a mining contest, the government is required only to show by competent evidence that there has been no discovery of a valuable mineral deposit.

Mining Claims: Common Varieties of Minerals: Generally

Deposits of high quality sand and gravel, suitable for use without expensive processing, but the market for which is limited to use for road base, asphalt mix, concrete aggregate and rock chips, the same purposes for which other widely available, but less desirable, deposits are marketed at the same price, are common varieties of sand and gravel not locatable since these facts do not give them a special, distinct value as defined in the Act of July 23, 1955.

Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity

Where a placer mining claim was located for common variety sand and gravel prior to July 23, 1955, and sand and gravel was mined, removed and marketed at a profit before and on July 23, 1955, it is proper to consider the claim as having demonstrated a present marketability as of that date.

APPEARANCES: W. C. Lamoreaux, Esq., Salt Lake City, Utah, and E. A. Hollingsworth, Esq., Las Vegas, Nevada, for the contestee; Otto Aho, Esq., Field Solicitor, United State Department of the Interior, Reno, Nevada, for the contestant.

OPINION BY MR. HENRIQUES

Contestee appeals from the decision of Administrative Law Judge Graydon E. Holt 1/ declaring null and void its Charleston, Charleston Nos. 1-8, 11-22, and Charleston 12A and 13A placer mining claims. Contestant appeals from the decision of the Judge declaring valid Charleston Nos. 9 and 10 placer mining claims.

The contest was initiated by the filing of a complaint in the Nevada Land Office, Bureau of Land Management, on November 12, 1965. In the complaint, the contestant alleged that:

1. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955.

The contestee filed an answer controverting these allegations and a hearing was held before an Administrative Law Judge on October 28 and 29, 1969, at which time both sides presented supportive testimony and submitted various evidentiary exhibits. On October 30, 1970, the Judge handed down his decision from which both sides have taken an appeal. The crucial determinations of the Judge were as follows:

1. That the claims embraced a common variety of sand and gravel, such as was removed from mineral location by the Act of July 23, 1955;

2. That marketability as of July 23, 1955, was shown only as relates to Charleston Claim No. 10;

3. That Claim No. 9 could be validated as a reasonable reserve;

4. That all other claims were null and void for the lack of a valid discovery.

_____

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

Before discussing the many points raised on appeal it would be helpful to examine the historical background of the claims in question. The Judge very succinctly stated the history of the claims and his statements, set out below, are hereby adopted:

> The Charleston and Charleston Nos. 1-22 placer claims were located February 18, 1942, by A. M. Murphy and Fred Pine. They quitclaimed the claims to Frank R. Sullivan on April 9, 1959, and he quitclaimed the claims to the Charleston Stone Products, Inc., on January 4, 1960. The Charleston Nos. 12A and 13A were located on September 15, 1961, by the contestee-corporation. The claims embrace a massive sand and gravel deposit in a canyon extending from west to east over a distance of four miles. The descending gradient of the canyon floor is approximately 375 feet per mile eastward. The center of the claims is 15 miles northwest of Las Vegas, Nevada, and they are accessible to the city by road. The quality of the sand and gravel is excellent for such uses as road bases, concrete and plaster aggregate, and leach rock. The quantity has not been determined but the parties were in substantial agreement that there is [sic] at least 20,000,000 cubic yards of material and probably a great deal more.
>
> Prior to 1940 Las Vegas was a relatively small community and much of the land surrounding the city was public land. During that period whenever a builder or contractor wanted small quantities of sand or gravel he merely took the material from the most convenient location on the public land. The material on the Charleston group of claims was used in this manner for many years when there was a construction project in the area. In recent years the city has become an industrial complex and much of the surrounding public land has been disposed of under various land laws and regulations. Because of this loss there is now a limited number of sites on remaining public land to secure quality sand and gravel. The land on which the Charleston claims are located was at one time reserved for small tract classification by the Bureau of Land Management. Later the Bureau determined that the canyon was subject to flash floods and was not suitable for small tracts. The Bureau then revoked the classification. There was no suggestion that the land within the claims is valuable for a purpose other than for the mining of sand and gravel.

Shortly after the claims were located in 1942, they were leased to Southern Nevada Industries, Inc. This company used the sand and gravel at first to make concrete blocks and later for the construction of the runways at Nellis Air Force Base, a short distance north of Las Vegas. The company had the material trucked to their plant some 10 miles north of the city. In the plant it was crushed, screened and washed. Mr. R. J. Kaltenborn, President of the company at the time, testified that the company removed from 75 to 100 thousand cubic yards of material at 5 cents a yard royalty during 1942 and 1943. In the latter part of 1943 the company opened a pit near Henderson, 13 miles southeast of Las Vegas, and discontinued using materials from the claims.

The next major user of the claims was E. H. Brawner. Mr. Brawner leased the claims on September 18, 1954, for a five-year period and agreed to pay a royalty of 10 cents a cubic yard for material removed but not less than $200 per month (Exh. X-5). A number of witnesses recalled the Brawner operation on the claims between 1954 and 1958 and described his activities in considerable detail. Probably the most accurate description can be found in the deposition of Starr Hill, Jr. In 1956 Mr. Hill and Earl M. P. Lovejoy, as mining engineers for the Bureau of Land Management, made a marketability study of the sand and gravel industry in the Las Vegas Valley. Their report is dated November 1956 (Deposition Exh. A).

Mr. Hill testified that he and Mr. Lovejoy observed the Brawner operation in September and October 1956. The equipment consisted of a crusher and grader which was located in a large pit on Claims 9 and 10. At that time Mr. Brawner had produced 15,000 yards from the pit for use as plaster and masonry sand, concrete blocks and conduit pipe aggregates. The Stocks Mill and Supply Company was the major purchaser of the material. Mr. Hill described the deposit and expressed the belief that it was the best material he had seen in the valley from the standpoint of quality and quantity. The material on the western end of the claims is relatively free from fines or silt. On the eastern and lower end the amount of fines in the deposit increases. The Brawner deposit was the farthest operating deposit from Las Vegas at the time but many of the other deposits had excessive fines. Statistical information from the report is that the depths of the deposit exceeds 120 feet, calculated reserves 20,000,000 cubic yards, and the cost of a semi-portable

> plant was estimated to be $76,000. On page 42 of the report Mr. Hill listed the future orders for November 1956 at $6,800, for December 1956 and January 1957 at $5,950 and for February, March and April 1957 at $23,000. Mr. Brawner had no water to wash the fines in the material but did have a blower to remove the silt and other fines. Mr. Hill expressed the belief that the claims were valid.
>
> The Brawner lease was canceled as a result of a judicial decree dated August 13, 1959. The claim owners had prayed for such cancellation and a judgment of $8,000 for the nonpayment of royalties (Exh. X-5).

Before further discussing the evidence adduced, two issues should be examined. First, the requirements for a discovery are now well established. A discovery exists:

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine * * *. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This "prudent-man" test has been refined by a requirement that a showing be made that the mineral in question can be extracted, removed and marketed at a profit. United States v. Coleman, supra. This "marketability test" has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969). And since the Act of July 23, 1955, 30 U.S.C. §§ 611 et seq. (1970), withdrew common varieties of sand and gravel from location under the mining laws, it is necessary that the claimant for such materials show marketability as of that date. Palmer v. Dredge Corp., supra; United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971).

Furthermore, under well settled rules:

> * * * it must be shown * * * that there was a valid discovery on each claim at the time of the application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are now invalid if, because of exhaustion of the deposits, or

> change of economic conditions, cessation of a market for the material, or some other cogent factor, the value of the minerals will not justify further expenditures for the development of a mine.

United States v. Paul M. Thomas, et al., 1 IBLA 209, 78 I.D. 5, 19 (1971). This principle is of equal applicability to contest proceedings initiated prior to application for mineral patent. See Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964). So it is clear that not only is a showing of marketability as of July 23, 1955, required, but that the contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the common variety mineral has continued without any prolonged interruption. This requirement flows from the fact that if the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost and the claim may be declared null and void after contest proceedings. Mining claims are properly declared null and void for lack of present discovery of a valuable mineral deposit where there is no market or any reasonable prospect for a future market for the mineral for which the claims were located. United States v. Estate of Alvis F. Denison, 76 I.D. 223 (1969), Mulkern v. Hammitt, 326 F.2d 896 (9th Cir. 1964). Since the Act of July 23, 1955, supra, expressly removed common varieties of sand and gravel from location under the mining laws, later recovery of a profitable market cannot serve to resuscitate such invalid claims.

Second, the contestee strenuously contends that the Judge erred when he held that a showing of marketability of the sand and gravel deposit on each claim was required to validate that claim. It cites the decision rendered in United States v. Alfred N. Verrue, 75 I.D. 300, 306 (1968):

> * * * [I]t must be shown * * * that the particular deposit itself can, and could at the critical date, be mined and marketed at a profit.

From this it argues that proof of marketability on any one claim should be sufficient to establish marketability on all claims which embrace the same deposit.

Suffice it to say that such is not the law as consistently applied by this Department. There must be evidence as to the marketability of each of the claims. See e.g., United States v. Henrietta Bunkowski and Andrew Julius Bunkowski, 5 IBLA 102, 120, 79 I.D. 43, 51-52 (1972), "The appellants must show as to each claim

that they have found a mineral deposit which satisfies the prudent man rule . . ." (emphasis in original); United States v. Frank and Juanita Melluzzo, 76 I.D. 181, 189 (1969), "The appellants must show as to each claim that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on that claim." (emphasis in original) See also Osborne v. Hammit, Civil No. 414 U.S.D.C.D. Nev. August 19, 1964.

Contestee's argument applied to the location of common varieties of sand and gravel, would prove too much. Under its auspices a person could locate an entire desert and establish its marketability by selling sand and gravel from a single location. The fact that contestee's location followed the bed of a wash and that it has not attempted to embrace an entire alluvial fan would not limit the scope of the rule it seeks to have implemented.

Its argument that the effect of such a holding is to require competition with itself has been pressed before. See United States v. Fisher Contracting Company, A-28779 (August 21, 1962). There, as here, the contestee has misunderstood the thrust of the requirement. It is not required that the claimant produce from each claim, but that it show marketability from each claim. Production is not a prerequisite for a finding of marketability. See United States v. Howard S. McKenzie, 4 IBLA 97 (1971). The Department, however, has recognized the difficulty of proving marketability without showing any sales, pointing out in numerous cases that, while the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299, 306 (1969), and cases cited.

Testimony that there was a general demand for sand and gravel in the Las Vegas areas of the type present on these claims is insufficient to satisfy the present marketability test; the claimants must show the existence of an actual demand for material from specific claims as of July 23, 1955. See United States v. William A. McCall, Sr., et al., 2 IBLA 64, 78 I.D. (1971).

The contestee argues that the Government failed to present a prima facie case as to the invalidity of the claims. What is

required of the Government to sustain its burden has been stated in the past in a variety of ways. It has been said that: "[p]rima facie means that the case is completely adequate to support the government's contest of the claim and that no further proof is needed to nullify the claim." United States v. Henrietta Bunkowski and Andrew Julius Bunkowski, supra. This burden has been held to have been met where there is "testimony * * * by a government mineral examiner that he has examined the mining claims and the workings thereon but found no evidence of a valuable mineral deposit." United States v. Harold H. Benson, A-31061 (September 4, 1969); United States v. L. B. McGuire, 4 IBLA 307 (February 4, 1972). In the case at bar, Donald Fisher, a mining engineer employed by the Department of the Interior, testified as to his investigations of the claims, which included an examination of the land as well as interviews with various sand and gravel operators in the Las Vegas valley and from which he concluded that there had been no discovery as of July 23, 1955, because of the excessive distance to Las Vegas market and the production of other competitors in the area. Thus, the Government established a prima facie case of invalidity under the requirements set out above.

The Government having presented a prima facie case, the burden of proof was on the contestee to establish a discovery as to each claim. To expedite the consideration of the evidence and testimony presented in the hearing, a synopsis of the testimony of witnesses which have relevance to this issue follows.

The Government witness, Fisher, testified that from the size of the pits remaining he estimated that the following quantities had been extracted: from the Charleston No. 4, 1,370 cubic yards; No. 6, 100 cubic yards; No. 7, 55 cubic yards; No. 9, 4,485 cubic yards; No. 10, 84,400 cubic yards; No. 14, 37,700 cubic yards; No. 16, 15,615 cubic yards; No. 17, 24,485 cubic yards; No 18, 350 cubic yards; No. 21, 2,830 cubic yards. Two factors, however, must be kept in mind in dealing with these figures. First, they do not represent the amount of material removed as of July 23, 1955, but rather indicate the total amount taken through 1965, and, in some minor cases, thereafter. The second point is that Claims Nos. 1-10 lie directly in a wash and thus are subject to fill in occurring as a result of flash flooding. Therefore, it is possible that deposition has erased evidence of greater excavations than were indicated by Fisher's calculations.

Fisher also testified that the haul from the main pits located on Claim No. 10 to the Las Vegas market was 15 miles and that in 1955 it would have resulted in excessive costs making operations on the claims unprofitable.

The Government introduced a report, written in 1961 by Edgar A. Hollingsworth, contestee's attorney, who at that time was employed by the Bureau of Land Management, Department of the Interior, which in reference to the termination of the Brawner operations declared: "According to the other operators in the area, the excessive length of the haul necessary to get finished products to market caused the company to cease its operations."

The contestee presented a number of witnesses. Rae Allen Wheeler, Jr., who had been in a trucking business in Las Vegas for 25 years, testified that he hauled approximately 300 tons of leach rock a day from Claims Nos. 4, 6, 16, 17, and 21, or a total of 3,000 to 4,000 tons a month from the middle of 1954 to 1958. This leach rock was for use in a sewage plant then under construction. The witness admitted that since that time he had not hauled any leach rock to the sewage plant.

Vernon Frehner, a contractor and trucker in the area, testified that he hauled approximately 5,000 cubic yards of road chips from 1954 to 1957 or from 1956 to 1957 from the Charleston claims and that he got "some of it" about a quarter or a half mile up the wash from the pit on Claim No. 10, which would put the extractions either within Claims Nos. 6, 7 or 8. He also declared that he generally hauled from Claims Nos. 11 and 12.

H. Guy Jacka, superintendent of streets for the city of North Las Vegas, testified that he had purchased several thousand tons of rock chips annually from 1954 to 1958 from Brawner. He declared that he was familiar with the claims and that the material had come from Claims Nos. 13, 13A and 14.

The testimony of Harrison S. Stocks, Chairman of the Board of Directors of the Stocks Mill and Supply Company, was secured by deposition. Stocks declared that he had used material from the area of the claims for more than 30 years for his concrete aggregate and plaster sand business. The materials had been obtained from Claims Nos. 8, 10, 11, 12, 14 and 15. While the exact amount obtained was unclear, Stocks further testified, however, that between 1948 and 1964 his company had very little interest in the claims. He also stated that Brawner did not have a processing plant to wash his material and as a result could not sell sufficient material.

Herman J. Young testified that after the contestee-corporation acquired the claims in 1960, he conducted an investigation on behalf of Morrison-Knudsen Construction Company to determine the feasibility

of operating a plant on the claims for all types of aggregates such as base coarse, asphalt coarse, and concrete aggregate. A screening plant was constructed on Claim No. 10 and was in operation sporadically from 1963. He planned a much more elaborate plant to crush, grade and wash the material but, owing to internal dissension within the company, he was not able to construct such a plant. Young expressed the belief that a screening plant alone was not feasible but that a complete plant to produce all potential sand and gravel products would be profitable. In addition to the operation on Claim No. 10, Morrison-Knudsen produced 37,000 cubic yards of type 1 fill material from Claim No. 14 during this period. Morrisson-Knudsen paid the contestee $7,071 for 28,284 yards of this material in 1963 and 1964 (Exhibits N, O, and P). When questioned regarding the reserves of aggregate remaining on Claims Nos. 9 and 10 he estimated that there were approximately 48,000 cubic yards for each foot of depth which would amount to 4,800,000 cubic yards at a depth of 100 feet.

John C. Godfrey, Secretary of Charleston Stone Products, Inc., testified that in recent years the corporation excavated a well with ample water on Claim No. 22 at a cost of $13,000 and installed a large storage tank for use in the washing of gravel. After securing this water, the corporation negotiated a lease agreement with Arden Sand and Gravel Company and Stocks Mill and Supply Company. The lease dated July 15, 1964 (Exh. B), provides for minimum royalty of $12,000 per year and requires the contestee to construct a power line from the nearest available supply point to the well on Claim No. 22. The lease contemplated that the Arden Sand and Gravel Company would produce sand and gravel products and that the Stocks Mill and Supply Company would purchase the material for use as concrete mixed in its aggregate business.

Two other witnesses testified that they made removals of materials from various claims. Another testified that his company (Concrete Conduit) purchased approximately 22,000 cubic yards in two years commencing sometime after 1965, the material coming from Claim No. 10.

Contestee contends that the sand and gravel deposits located on each of the claims is an uncommon variety with the result that it is not required to prove marketability as of July 23, 1955, but only as to the time of the institution of contest proceedings. The relevant statute provides, inter alia, that:

> No deposits of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the

> United States so as to give effective validity to any mineral claims hereafter located under such mining laws. * * * "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value. * * * (Emphasis added.) 30 U.S.C. § 611.

The regulations regarding common varieties are found in 43 CFR 3711.1(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. * * *

The Department has interpreted the Act and regulations so as to require an uncommon variety of sand, stone, etc., to meet two criteria: "(1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use." United States v. U.S. Minerals Development Corporation, 75 I.D. 127, 134 (1968).

The criterion for determining whether a deposit of sand and gravel claim contains an uncommon variety is whether the material from the deposit commands a higher price in the market place or has uses for which ordinary varieties would be unsuited. United States v. U.S. Minerals Development Corporation, supra. The Judge in the case at bar held that "the sand and gravel on this group of claims are high quality materials but used only for the same purposes as many other deposits of sand and gravel in the Las Vegas Valley. There was no evidence that the materials have a special and distinct value for these uses." Accordingly, he held that the deposit must be considered a common variety as defined in the Act of July 23, 1955, supra.

The contestee takes vigorous exception to this finding and argues that for a variety of reasons the deposit is unique. 2/ A close reading of the Judge's decision, however, reveals that he did not controvert this contention but rather found that there was no evidence, even assuming the presence of unique properties, that these properties imparted a distinct value to the deposit.

On this point, rather than attacking the Judge's findings of fact, the contestee argues that the position of the Department is unsustainable by any fair reading of the statute. It argues that the Department is limited to a consideration of the intrinsic properties of the mineral and that by relating its special value to its proposed use, the Department has violated the intent of the Congress in enacting section 3, Act of July 23, 1955, supra.

The difficulty with the contestee's position is that the statute requires that the deposit, to be uncommon, must have "some property giving it distinct and special value." Valuation, by its nature, requires advertence to exogenous factors. Gold has value in relation to the scarcity of its occurrence. By the same token, to speak of the value of so ubiquitous a commodity as sand or gravel without reference to its use is to shovel smoke. In dealing with such commonly occurring minerals consideration of prospective use is an integral adjunct to any attempt to ascertain value, and particularly to determine "special value" as required by the clear statutory language. The consideration of prospective use is not extrinsic in the sense of the location of the deposit; rather it is part and parcel of the evaluation of the deposit mandated by Congressional intent. As such, Departmental practice is clearly in accord with the statutory provisions.

As there has been no evidence introduced that the sand and gravel occurring in the deposit can call forth a higher price for any of its destined uses, even assuming arguendo that it is of superior quality, the Judge was correct in holding that the minerals were a common variety. And, a fortiori since the Charleston Claims Nos. 12A and 13A were not located until after July 23, 1955, they cannot be the subject of a valid discovery.

2/ Among the qualities which he contends might give the deposit unique value are: high specific gravity; marked resistance to abrasion; insignificant reactivity; and absence of caliche. In light of the disposition of this issue, infra, it is not necessary to decide whether the conjunction of the characteristics set out are sufficient to give the deposit a unique value.

On the issue of marketability the Judge found that:

> "Mr. Brawner was operating from Claim 10 and was utilizing material from Claim 9 at the rate of approximately 5000 yards a year * * * As to the latter part of 1955 or in 1956 the Brawner operation would have been sufficient to validate Claim 10 and, as the source of the reserve material, Claim 9.

The government raises a number of contentions regarding this finding. First, it argues that the removals, at the rate of 5,000 cubic yards annually, represent such a small amount of income that they should be considered de minimis. See, e.g., The Atchison, Topeka & Santa Fe Railway Co. v. Emma Mae Cox, 4 IBLA 279 (January 31, 1972). It is noted in the record, however, that Mr. Brawner, as a lessee had agreed to pay a minimum royalty of $200 a month for the right to operate from the claims. Thus, to the lessors, the annual income from the claims would be the $2,400 per year rental. It is, of course, true that the rental was based on the right to mine all of the claims. But in point of fact, the Brawner operation at the critical date was primarily limited to Claim No. 10, and the valuation he put on its worth by limiting his activities to its area, while obligating himself to the full annual rental, is certainly probative of the claim's real marketability.

The government further contends that even granting the marketability of the material on Claim No. 10 as of July 23, 1955, this marketability was lost between that date and the initiation of the contest proceedings. On this point the Judge found that:

> * * * there has been a market for the material from Claims 9 and 10 since 1955. What was lacking was not a market, but an operator-lessee with the proper equipment to produce the material.

The government contends that there was no production from 1957 to 1965. The government's witness Fisher testified, however, that during 1959 and 1960 Frank R. Sullivan, who in 1959 had acquired the claims from the original locators, was reported "* * * to have produced and stockpiled considerable amounts of sand and gravel on the claims. * * *" Fisher subsequently related a conversation with Sullivan in which the latter declared that the material removed "* * * was used when he had the claims for roofing granules at Nellis Air Force Base." Further, the lack of production from 1960 to 1963 was adequately explained by Young as the result of internal friction within Morrison-Knudsen, and certainly the contract negotiations

between Charleston Stone Products, Inc. and Stocks Mill and Supply Co. and Arden Sand and Gravel, culminating in a beneficial agreement, have not worked a termination of the market for the material from Claim No. 10. Thus, there was no loss of market as regards Claim No. 10, and accordingly, we find that the Judge correctly validated Claim No. 10.

The government also argues that the Judge erroneously validated Claim No. 9 as a source of reserve material. Two points are salient on this issue. The Judge had already found that 5,000 cubic yards of material were mined annually from claim No. 10, with some overlap into Claim No. 9. It is stated in the record that the estimated reserves on Claims Nos. 9 and 10 are in excess of 1,000,000 cubic yards of useable material. At the rate of removal occurring in 1955, the Judge's decision provides as a reserve a 200-year supply. This is far in excess of the reserve normally granted, see United States v. Robert E. Anderson, Jr., 74 I.D. 292 (1967). Even utilizing the Judge's stated rationale it is difficult to see how Claim No. 9 could be validated as a source of reserves.

A more basic problem is, as was pointed out by the Government, the Judge's misunderstanding of 43 CFR 3711.1(b), as it relates to reasonable reserves. A claim is not validated as a reasonable reserve; rather, the presence or absence of a reasonable reserve within the claim is looked to in determining the present marketability thereof. See United States v. William A. McCall and R. V. Kaltenborn, 1 IBLA 115, 122 (1970). There must be independent evidence of the present marketability of a claim held as a reserve in order to validate that claim. United States v. Neil Stewart, 5 IBLA 39, 55 (1972). Thus, Claim No. 9 must rest upon its own factual situation and the Judge's validation of it "as a source of reserve material" must be set aside. If it is to be validated, it must have independent marketability. For reasons elaborated, infra, we believe that it does not and therefore to this extent the Judge's decision must be reversed.

The Judge also found that the contestee had not established marketability as of July 23, 1955, for any of the remaining Charleston placer claims.

Contestee admits that there was no evidence of actual sales as regards the Charleston, and Charleston Nos. 1, 2, 3, 5, 18, 19, 20, and 22.

The contestee argues that leach rock was quarried on Claim No. 8, but no testimony was adduced on this contention. Contrary to contestee's
interpretation both contestant's Exhibit 6 and contestee's

Exhibit X-4 support the government witness Fisher's statement that the quarrying occurred at the southwest corner of Claim No. 10 and outside of the northeast corner of Claim No. 8. It is, of course, obvious that the "face" of the deposit continues into Claim No. 8, but there is, in the record, no evidence of any mining of leach rock from Claim No. 8. As regards the testimony of Mr. Wheeler, it is to be noted that it was stipulated by counsel for both parties that leach rock has a useful life of approximately 15 years. The demand for leach rock is limited to that amount needed to supply nearby sewage and water filtration plants, a market which is both limited and of infrequent recurrence. Cf. United States v. Clark County Gravel, Rock and Concrete Company, A-31025 (March 27, 1970) as regards the supply of volcanic or leach rock in the Las Vegas area. We have noted, supra, that the marketability requirement as it relates to minerals withdrawn from location is a continuing one, and while it may be difficult to draw a precise line delineating at what point the loss of a market has negated a prior discovery, it is obvious from the facts of the instant case that such a loss occurred here. Since relocation of the claim is impossible, the proposed expansion of the filtration system in the area which coincided with the contest proceedings would be insufficient to revive a claim predicated on the presence of leach rock thereon. Therefore, these removals may not properly be considered in the determination of the marketability of the deposits in Claims Nos. 4, 6, 16, 17 and 21.

The removals by Vernon Frehner occurred in 1956. Accordingly, they may not properly be considered as to the issue of marketability at the critical date of July 23, 1955.

Stocks testified that his purchases of materials terminated in 1948. Contestee argues that because of his advanced age, Stocks was mistaken as to the dates involved. It seems to us somewhat anomalous to argue that Stocks could err up to seven years as regards the time element and then go on to contend that his testimony is sufficiently accurate in reference to the location of the mining activities so as to validate Claims Nos. 8, 11, 12, 14 and 15. Be that as it may, Stocks repeatedly testified that he had no access to the claims after 1948 and his testimony as to the withdrawals can only be given weight in relation to the dates he has insisted on.

Jacka's testimony referred to Claims Nos. 13, 13A and 14. Claim No. 13A, of course, has already been deemed void ab initio since it was not located until after the passage of the Act of July 23, 1955. Jacka, however, at one point declared that he

bought no material until 1956 and another time declared that Brawner was the low bidder for supplying chips to the city of North Las Vegas from 1954 to 1958. This apparent contradiction in testimony can only be reconciled by assuming that though Brawner was the low bidder, no actual purchases were made until 1956. This is in accord with Jacka's statement concerning a flood in either 1954 or 1955, the aftermath of which prevented resurfacing work from going forward. Accordingly, no actual sales have been proved from the claims at the critical date. The other testimony as regards extractions was too general to be efficacious in determining the locus of actual sales occurring prior to the critical date.

Actual sales, however, are only one indicium of marketability. Other relevant criteria are bona fides of development and distance to the market. As of 1955 the distance to the market from the main pits, approximately 15 miles, appears excessive. Certainly the distance cannot be said to weigh positively on the side of marketability. Furthermore, bona fides in development occurred only in Claim No. 10. 3/ Bona fides, like marketability, must be related to specific claims, and contestee cannot successfully apply the bona fides shown as regards No. 10 to validate the other claims. 4/

Considering the market demand and the supply available for that market as of July 23, 1955, we find that the contestee has not met the burden of proving marketability as to the claims other than Claim No. 10.

3/ It is to be noted that much of the evidence adduced at the hearing related to present developmental intentions. However relevant such plans may be to the issue of marketability at the time of the contest proceedings, they cannot be said to bear on the issue of marketability as of July 23, 1955. Since we have decided that there was no showing of marketability as of the date of withdrawal of sand and gravel from mineral location, it is unnecessary to examine the question of whether, and to what extent, marketability was shown as of the date of the initiation of the proceedings.

4/ Contestee protests that this decision would leave him without a water supply. While this may well be the case, it is nevertheless impossible to validate a claim simply because the contestee needs it for the more economic workings of a valid claim. Claim No. 22, on which the well is located, must stand or fall on the merits of its discovery. Having determined that there was no valid discovery thereon, supra, the mere fact that there is now a producing water well on the claim will not nullify the absence of a valid discovery.

We have also considered the evidence in light of the recent decision of the Ninth Circuit Court of Appeals in United States v. Verrue, 457 F.2d 1202 (1972). We note that its rationale is inapplicable to the case at bar. In Verrue the Court validated the contested claim because there was no controversion of appellee's evidence that the "material on Sandy No. 2 was marketable at a profit" during the relevant period. Id. at 1204. Thus, the opinion in that case was directed to a contest of a single claim. This case, on the other hand, involves twenty-five different claims. The only clear statement as to marketability at the critical date is found in the deposition of Starr Hill, Jr. He declared that he considered all the Charleston claims to be valid.

This simple statement, however, cannot be used to validate all twenty-five claims. All that it can fairly be said to indicate was that there was an existing market, at the critical date, for sand and gravel from some of the claims embracing the deposit. To the extent that this declaration has reference to Claim No. 10 we agree. But it cannot be said that Hill had advertence to each of the twenty-five claims when he made his statement; the very next question asked was whether he agreed "* * * that the deposit encompassed by the claims was a valid mineral deposit under the mining laws?" To which Hill answered, "Yes."

It seems clear that Hill was utilizing the theory, advanced by the contestee, that the establishing of the validity of one claim on a single deposit has the effect of validating all claims on that deposit. We have rejected this position for the reasons stated, supra.

Another crucial difference between the case at bar and that in Verrue is that the latter case does not encompass the issue of loss of market after a valid location, but is merely limited to the question of the marketability of the claim at the critical date. In the instant case sales, developmental work, etc., on all of the claims, with the exception of Claim No. 10, occurred infrequently and intermittently. Thus, even if a finding of marketability as of July 23, 1955, were mandated by the Verrue decision, subsequent events provide ample proof that the marketability had been lost and could not be regained, for the reasons discussed, supra. Therefore, the Verrue case does not, by any realistic reading, require the validation of all of these claims.

Appellant has requested oral argument. The issues in this case, however, have been extensively briefed by both parties before the Judge and again before this Board. Oral argument would therefore serve no useful purpose and it is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed as to its holding that the Charleston No. 9 placer mining claim is valid, and is affirmed as to its holding that the Charleston No. 10 placer mining claim is valid, and the Charleston, and the Charleston Nos. 1-8, 11-22, 12A and 13A placer mining claims are invalid.

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Douglas E. Henriques, Member

We concur:

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Joseph W. Goss, Member

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Martin Ritvo, Member